

FILED BY CLERK

JUN 29 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

APRIL ABAD, an individual; MAKANA)
ABAD, a minor, by and through April)
Abad (Mother); LESLEEN GONZALEZ,)
a minor, by and through April Abad)
(Mother); JASON and AMANDA)
ANDERSON, husband and wife;)
MEREDITH ANDERSON, a minor, by)
and through Amanda Anderson (Mother);)
DILLON SPOON, a minor, by and)
through Amanda Anderson (Mother);)
KATHERINE and PAUL BARNETT,)
husband and wife; PATRICK BARNETT,)
an individual; ROSEANNE BARNETT, a)
minor, by and through Katherine Barnett)
(Mother); DAVE and RACHAEL)
BULLIS, husband and wife; STEPHEN)
and NIKKI BULLIS, husband and wife;)
RICHARD CHOLAS, an individual;)
LORI CLAIR, an individual; JOSEPH)
and SARAH CORBETT, husband and)
wife; ISAAC CORBETT, a minor, by and)
through Sarah Corbett (Mother);)
MICHAEL CORBETT, a minor, by and)
through Sarah Corbett (Mother); JEFF)
and THERESA DAVIS, husband and)
wife; KYLE DAVIS, a minor by and)
through Theresa Davis (Mother);)
NICHOLAS DAVIS, a minor, by and)
through Theresa Davis (Mother);)
SHAYANNA DUPREE, a minor, by and)
through Cassidi Smith (Mother);)
SHARLON ESMAY, an individual;)
ANGELIQUE FLORES, a minor, by and)
through Roy Flores (Father); ROBERT)
FLORES, a minor, by and through Roy)
Flores (Father); TAMARA FORTUNE,)
an individual; TIA McDONALD, a minor,)
by and through Tamara Fortune)

2 CA-CV 2006-0109
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

(Mother); JOSIAH WALLACE, a minor,)
by and through Tamara Fortune)
(Mother); LEE and ANTOINETTE)
FOULKES, husband and wife;)
ABRAHAM FOULKES, a minor, by and)
through Lee Foulkes (Father);)
JEREMIAH FOULKES, a minor, by and)
through Lee Foulkes (Father); FARRELL)
and SHARON FUTCH, husband and)
wife; CASSANDRA FUTCH, a minor, by)
and through Farrell Futch (Father);)
TIMOTHY GRANILLO, an individual;)
ALAZAI GRANILLO, a minor by and)
through Timothy Granillo (Father);)
BETTIE HANNA, an individual;)
CANDYCE COLSTON, a minor, by and)
through Bettie Hanna (Mother); KARA)
HART, an individual; JORDAN)
O'LEARY, a minor, by and through Kara)
Hart (Mother); RHIANNON O'LEARY, a)
minor, by and through Kara Hart)
(Mother); ROY FLORES and)
FLORENTINA HOLLINGSWORTH,)
husband and wife; MONTEL)
McKINLEY, a minor, by and through)
Florentina Hollingsworth (Mother);)
SABRINA McKINLEY, a minor, by and)
through Florentina Hollingsworth)
(Mother); JASON HUGGINS, an)
individual; ANTHONY HUGGINS, a)
minor, by and through Jason Huggins)
(Father); EMILY HUGGINS, a minor, by)
and through Jason Huggins (Father);)
ANDREA JACKSON, an individual;)
KALISHA WILLIAMS, a minor, by and)
through Andrea Jackson (Mother);)
KEVIN WILLIAMS, a minor, by and)
through Andrea Jackson (Mother);)
AMELIA KAME, an individual; MARCO)
KAME, an individual; JOHN and LORI)
LARSON, husband and wife; MICHAEL)
CONTI, a minor, by and through Lori)

Larson (Mother); LUKE LARSON, a)
minor, by and through John Larson)
(Father); ANGELA MAYNES, an)
individual; ELDEN PHILLIPS, an)
individual; HELEN JOYCE)
RAVANCHO, an individual;)
JONATHAN RUHOFF, a minor, by and)
through Sienna Ruhoff (Mother);)
NATHANIEL RUHOFF, a minor, by and)
through Sienna Ruhoff (Mother);)
CASSIDI SMITH, an individual;)
KELSEY SMITH, a minor, by and)
through Cassidi Smith (Mother); JOHN)
STEIGER, an individual; JAMES and)
KUULEME STEPHENS, husband and)
wife; BRITIAN HACKEBORN, a minor,)
by and through Kuuleme Stephens)
(Mother); JACKLYN STEPHENS, a)
minor, by and through James Stephens)
(Father); JESSE STEPHENS, a minor, by)
and through James Stephens (Father);)
FAYE SULLIVAN, an individual;)
NATASHA SULLIVAN, an individual;)
ALICIA SWIEGART, an individual;)
AARON and TIFFANY WELCH,)
husband and wife; ALAIENA WELCH, a)
minor, by and through Tiffany Welch)
(Mother); DEREK WELCH, a minor, by)
and through Tiffany Welch (Mother),)
CONSTANCE WELCH, an individual;)
CHERIE WELCH, a minor, by and)
through Constance Welch (Mother);)
VANESSA WELCH, a minor, by and)
through Constance Welch (Mother);)
WADE WELCH, a minor, by and through)
Constance Welch (Mother); MELISSA)
WELCH, an individual; MICHAEL and)
KIM WORDEN, husband and wife;)
ELISA WORDEN, a minor, by and)
through Michael Worden (Father);)
GABRIEL WORDEN, a minor, by and)
through Michael Worden (Father);)

JUSTIN SCOTT, a minor, by and through)
Kim Worden (Mother); and KALENA)
SCOTT, a minor, by and through Kim)
Worden (Mother),)

Plaintiffs/Appellants,)

v.)

WASATCH PROPERTY)
MANAGEMENT, INC., a foreign)
corporation; WASATCH POOL)
HOLDINGS, L.L.C., a foreign)
corporation; EASTSIDE PLACE)
APARTMENTS, INC., a foreign)
corporation; CREEKSIDE PLACE)
HOLDINGS, L.L.C., an Arizona)
corporation; DELL LOY HANSEN, an)
individual; and RANDY HANSEN, an)
individual;)

Defendants/Appellees.)

ALICIA SWIEGART, on behalf of herself)
and CHAD TABOR, and as next best)
friend of Kaitlin Swiegart; NIKKI)
BULLIS, on behalf of herself and)
STEVEN BULLIS, and as next best)
friend of Ezekiel Bullis,)

Plaintiffs/Appellees,)

v.)

WASATCH PROPERTY)
MANAGEMENT, INC., a foreign)
corporation; WASATCH POOL)
HOLDINGS, L.L.C., a foreign)
corporation; WASATCH PREMIER)
PROPERTIES, L.L.C., a foreign)
corporation; CREEKSIDE PLACE)

HOLDINGS, L.L.C., an Arizona corporation; EASTSIDE PLACE APARTMENTS, INC., a foreign corporation; DELL LOY HANSEN, an individual; and RANDY HANSEN, an individual,
Defendants/Appellees.

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20024299 and C20024542 (Consolidated)

Honorable Charles V. Harrington, Judge
Honorable John E. Davis, Judge

AFFIRMED

Harold Hyams & Associates, P.C.
By Harold Hyams

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Rusing & Lopez , P.L.L.C.
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Appellees Hansen

H O W A R D, Presiding Judge.

¶1 In this toxic tort action, the trial court granted various summary judgment motions against the plaintiffs, who had resided in Eastside Place Apartments, and in favor

of the defendants, who allegedly owned or managed the apartments. Plaintiffs appeal from those judgments entered pursuant to Rules 54(b) and 56, Ariz. R. Civ. P., 16 A.R.S., Pt. 2. Plaintiffs argue they raised genuine issues of material fact precluding summary judgment on various issues and the trial court erred in ruling on their motions for reconsideration. Because the trial court correctly granted the summary judgments based on the record before it and did not abuse its discretion in denying the motions for reconsideration, we affirm.

Factual and Procedural Background

¶2 This appeal arises from the toxic tort claims of over one hundred plaintiffs against over ten different defendants who allegedly owned or managed Eastside Place Apartments. The plaintiffs claimed they were exposed to toxic mold while living at Eastside Place and that exposure resulted in various injuries. Wasatch Property Management, Inc. and related entities (collectively, Wasatch) owned, operated, and managed Eastside Place. Randy and Dell Loy Hansen owned shares in Wasatch and served as officers of that corporation.

¶3 Wasatch and the Hansens filed separate motions for summary judgment. The trial court granted partial summary judgments in favor of Wasatch dismissing the claims filed by Katherine Barnett, Paul Barnett, Patrick Barnett, and Roseanne Barnett; Jordan O’Leary; Lori Clair; Alazai Granillo and Timothy Granillo; Angela Maynes; Helen Ravancho; and Faye and Natasha Sullivan (collectively, “the dismissed plaintiffs”). The trial court also granted summary judgment against all the plaintiffs in favor of the Hansens. The dismissed

plaintiffs challenge the Wasatch partial summary judgments and all plaintiffs challenge the summary judgment in favor of the Hansens.

The Wasatch Appeal

¶4 The dismissed plaintiffs argue that the trial court erred when it granted summary judgment in favor of Wasatch and dismissed them from the lawsuit. When reviewing a trial court’s grant of summary judgment, we analyze its factual and legal determinations de novo. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court properly grants summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1), 16 A.R.S., Pt. 2; *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). On appeal from a grant of summary judgment, we view the evidence and reasonable inferences from it in the light most favorable to the nonmoving party. *Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998). But our review is limited to those facts that were presented to the trial court in support or opposition of the motion for summary judgment. *See Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991) (trial court required to consider portions of record brought to its attention by summary judgment motion); *Mohave Elec. Coop. v. Byers*, 189 Ariz. 292, 302, 942 P.2d 451, 461 (App. 1997) (“All evidence and the record presented *at the time of the order* must be viewed in the light most favorable to the nonmovant.”) (emphasis added); *White v. Lewis*, 167 Ariz. 76, 80, 804 P.2d 805, 809 (App. 1990) (trial court not required to search entire record in ruling on summary judgment motion); *Nelson v. Nelson*,

164 Ariz. 135, 138, 791 P.2d 661, 664 (App. 1990) (“On review, this court only considers the evidence presented to the trial court when the motion was heard and does not consider any evidence introduced later.”).

¶5 On December 30, 2004, Wasatch filed a motion for partial summary judgment seeking dismissal of the claims of sixty-five individual plaintiffs. Wasatch argued evidence concerning many of the plaintiffs was insufficient to demonstrate that they were, in fact, exposed to injurious levels of mold in their respective apartments during their respective periods of tenancy. With respect to the dismissed plaintiffs, Wasatch contended that plaintiffs’ own expert stated that some of the dismissed plaintiffs’ apartments showed “no significant mold” and that the other dismissed plaintiffs’ apartments had not been tested for mold. The trial court denied summary judgment as to most of the challenged plaintiffs, but granted partial summary judgment in favor of Wasatch and dismissed the claims of the dismissed plaintiffs.

¶6 In controversies where a plaintiff has alleged injuries resulting from exposure to toxic substances, causation has been divided into “general causation” and “specific causation.” *See* Restatement (Third) of Torts: Liability for Physical Harm § 28 cmt. (c)(1), (3), (4) (Proposed Final Draft No. 1, 2007);¹ *see also* *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1120 (N.Y. 2006); *Terry v. Ottawa County Bd. of Mental Retardation & Developmental Delay*, 847 N.E.2d 1246, ¶ 49 (Ohio Ct. App. 2006); *Christian v. Gray*,

¹“Arizona courts generally follow the RESTATEMENT in the absence of controlling Arizona authority.” *Dixon v. City of Phoenix*, 173 Ariz. 612, 621, 845 P.2d 1107, 1116 (App. 1992).

65 P.3d 591, ¶ 21 (Okla. 2003); *Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265, 270 (Tex. App. 2006). General causation exists when “a thing possesses, under similar circumstances, a tendency or capacity to cause a similar effect elsewhere.” *Christian*, 65 P.3d 591, ¶ 21. Specific causation, on the other hand, “exists when exposure to an agent caused a particular plaintiff’s disease.” Restatement § 28 cmt. (c)(4). Consequently, the plaintiff’s burden includes proof that (1) the plaintiff was in fact exposed to a toxin at a level that could cause injury, (2) was injured, and (3) was exposed to a toxin that can cause the type of injury suffered. *See Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996); *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 989 (D. Ariz. 2000); *see also Parker*, 857 N.E.2d at 1120; *Terry*, 847 N.E.2d 1296, ¶ 49; *Christian*, 65 P.3d 591, ¶ 21; *Bailey*, 187 S.W.3d at 270.

¶7 If the plaintiff is unable to produce evidence of specific causation, i.e., exposure to the toxin and exposure at levels that would result in injury, the claim fails. *See Claytor v. Owens-Corning Fiberglas Corp.*, 662 A.2d 1374, 1384 (D.C. 1995) (“A mere showing that appellants worked at jobsites where appellees’ asbestos products were used at some point will not give rise to an inference, sufficient to defeat summary judgment, that appellants themselves may have been exposed to those products.”); *see also In re TMI Litig. Consol. Proceedings*, 927 F. Supp. 834, 870 (M.D. Pa. 1996), *aff’d in part and rev’d in part on other grounds*, 193 F.3d 613, (3d Cir. 1999) (plaintiffs failed to provide sufficient evidence of exposure to injury-inducing levels of radiation).

¶8 The dismissed plaintiffs quote *Claytor* to support their claim that they are entitled to prove their case “by circumstantial evidence, deriving the benefits of all reasonable inferences.” 662 A.2d at 1384. But the District of Columbia Court of Appeals also stated that “[i]t is the duty of the court . . . ‘to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.’” *Id.*, quoting *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958).

¶9 The dismissed plaintiffs also contend that “[d]etermination of mold caused illness is multi-factorial and is not limited to quantified measurements of mold.” Whatever the merits of that statement may be, the dismissed plaintiffs have not disputed Wasatch’s legal argument that causation in a toxic tort case requires proof of specific causation: that the plaintiffs were exposed to toxic mold at their apartments in levels that could cause the illnesses they claim they suffered. Thus, we examine the facts produced by the dismissed plaintiffs to the trial court in response to the summary judgment motion to determine if summary judgment was appropriate under that standard.

¶10 The dismissed plaintiffs argue that granting summary judgment in this case is “contrary to Arizona’s longstanding public policy favoring resolution of disputes on their merits.” But they did not present evidence to the trial court sufficient to overcome summary judgment. Therefore, we do not find this policy argument convincing.

I. The Barnetts

¶11 The Barnetts argue that the trial court erred when it dismissed their claim because their expert’s finding that there was “NO SIGNIFICANT MOLD” is inconsistent

with the evidence that there was visible mold in their apartment. The Barnetts claim that Wasatch's mold experts, Health Effects Group (HEG), performed a "walkthrough report which indicated the presence of visible mold and water damage." They also contend that "the drywall in the bathroom caved in when Mrs. Barnett cleaned the bathtub."

¶12 Wasatch responds to the Barnetts' argument by pointing out that the Barnetts do not cite the record to support these allegations and that the citations contained in the statement of facts all post date the trial court's entry of summary judgment. Although the Barnetts did not properly cite the record, *see* Rule 13(a)(6), Ariz. R. Civ. App. P., 17B A.R.S. (contentions raised on appeal must be supported by "citations to . . . parts of the record relied on"), they did state that evidence "of visible mold and water damage was provided to the Court in [plaintiffs'] Supplemental Opposition to Wasatch Defendants' Motion for Partial Summary Judgment." In that document and the statement of facts supporting it, the Barnetts did present the trial court with the HEG report finding visible mold in the Barnetts' apartment and evidence of an incident in which the dry wall in the bathroom caved in.

¶13 The Barnetts were required to present evidence of specific causation, that they were exposed not just to mold but to toxic mold at a level that could cause injury. *See Allen*, 102 F.3d at 199; *Grant*, 97 F. Supp. 2d at 989. The evidence that the Barnetts argue created a genuine issue of material fact merely suggests that there was some type of mold in their apartment. It does not indicate or suggest that the visible mold was toxic or that the Barnetts were exposed to it at a level that could result in injuries.

¶14 The Barnetts also argue that Drs. Goldstein, Marinkovich, and Dahlgren determined the Barnetts’ illnesses “were temporally connected to their residence at Eastside [Place]” and “were due to their exposure to mold.” But, again, those medical reports are not evidence that the visible mold in the Barnetts’ apartment was toxic or that the Barnetts were exposed to it in concentrations that could cause their injuries. The medical experts were qualified to opine that the Barnetts had certain illnesses, that toxic mold could have caused the illnesses, and even that a temporal connection existed. They were not, however, able to opine that the Barnetts were exposed to toxic mold at their apartment rather than somewhere else. *Cf. Mancuso v. Consol. Edison Co. of N.Y.*, 967 F. Supp. 1437, 1450 (S.D.N.Y. 1997) (“[I]t is improper for an expert to presume that the plaintiff ‘must have somehow been exposed to a high enough dose [of the toxin] to exceed the threshold [necessary to cause the illness], thereby justifying his initial diagnosis. This is circular reasoning.’”), quoting *O’Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1396 (C.D. Ill. 1992), *aff’d*, 13 F.3d 1090 (7th Cir. 1994) (second alteration in *Mancuso*). Therefore, the trial court did not err when it granted summary judgment against the Barnetts.²

²The dismissed plaintiffs state at the end of their arguments concerning the Barnetts, Clair, the Granillos, Maynes, Ravancho, and the Sullivans that Judge Davis erred in “refusing to reconsider” the grant of summary judgment. They also argue “the motion for reconsideration should have been at least reviewed . . . , [because h]ad it been, in all probability, the courts would have changed their mind.” But courts do not generally consider new evidence presented in a motion for reconsideration because “the prevailing party below is routinely deprived of the opportunity to fairly respond.” *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 212 Ariz. 462, ¶ 15, 133 P.3d 1168, 1172 (App. 2006). Furthermore, none of these statements “contain[s] . . . the reasons [supporting the argument],

II. Jordan O’Leary

¶15 Jordan O’Leary argues the trial court erred when it dismissed his claim. The trial court entered summary judgment against Jordan O’Leary because “no evaluation, report, affidavit or other document ha[d] been provided which would support his contention that his alleged injuries were caused by exposure to harmful levels of mold.”

¶16 O’Leary first argues the trial court erred because it “mistook Matthew O’Leary for being a separate plaintiff from Jordan O’Leary although they are one and the same person.” The complaint listed Jordan O’Leary as a plaintiff, but nothing in the opposition to the motion for summary judgment, the statement of facts supporting it, or the supplemental brief connected Jordan O’Leary to Dr. Goldstein’s report. O’Leary was responsible for the name used in the complaint and on the medical report and does not direct us to any place in the record where he alerted the trial court that Jordan and Matthew O’Leary are the same person. Nor did he argue in the motion for reconsideration that Matthew and Jordan are the same person and it was thus error to dismiss Jordan from the case. We will not consider arguments raised for the first time on appeal. *Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991). Therefore, we will not consider O’Leary’s contention that it was error to grant summary judgment against Jordan O’Leary because Jordan and Matthew are the same person.

with citations to the authorities, . . . and parts of the record relied on.” Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. Therefore, we do not consider them further.

¶17 O’Leary also argues the trial court should have considered Dr. Dahlgren’s medical report. He argues that the trial court should have permitted him to submit Dr. Dahlgren’s medical report after the motion for summary judgment was granted because “the Appellees never made an issue of the existence of medical evidence.”

¶18 In its motion for summary judgment, Wasatch argued that “[o]nce plaintiffs have established that mold existed inside their apartments during their tenancy [they] must then show that they *were injured* by this particular exposure to mold.” (Emphasis added.) And O’Leary, along with the other plaintiffs, submitted medical reports in opposition to the motion for summary judgment. Thus, O’Leary’s argument that Wasatch “never made an issue of the existence of medical evidence” is without merit.

¶19 Moreover,

[w]hen a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Ariz. R. Civ. P. 56(e), 16 A.R.S., Pt. 2. O’Leary provided no evidence in opposition to the summary judgment motion that he suffered an injury from exposure to harmful levels of mold at his apartment. Because medical evidence that Jordan O’Leary was exposed to the type and amount of a mold that could result in injuries he in fact suffered was required to support his claim, he was required to present such evidence to survive a motion for summary judgment. *See id.*

¶20 O’Leary minimally argues that he should have been permitted to submit reports raising a genuine issue of material fact in his motion for reconsideration, and therefore, the trial court erred in denying it. We review a trial court’s denial of a motion for reconsideration for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, ¶ 6, 33 P.3d 506, 509 (App. 2001). Rule 56(e) provides that reports and affidavits raising genuine issues of material fact must be submitted in response to a motion for summary judgment. It does not provide that supporting documents are to be submitted in response to the trial court’s grant of summary judgment, as O’Leary did in this case.

¶21 Furthermore, the cases that permit a party to raise new facts or argument showing a genuine issue of material fact for the first time in a motion for reconsideration are generally limited to situations in which the new facts or argument were not available to the nonmoving party prior to the entry of summary judgment. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 212 Ariz. 462, n.5, 133 P.3d 1168, 1173 n.5 (App. 2006). Neither O’Leary nor the other dismissed plaintiffs have argued here or below that the information in the motion for reconsideration was new or unavailable at the time they filed their opposition to Wasatch’s motion for summary judgment. Therefore, the report was available and known to O’Leary and the dismissed plaintiffs prior to filing the motion for reconsideration, and the trial court did not abuse its discretion when it denied that motion.

¶22 Because O’Leary failed to present evidence that his injury resulted from exposure to toxic mold, an essential element of his claim, the trial court correctly granted summary judgment against him.

III. Clair, the Granillos, Maynes, Ravancho, and the Sullivans

¶23 Clair, the Granillos, Maynes, Ravancho, and the Sullivans argue that the trial court erred when it granted summary judgment against them after determining that the record contained no evidence of mold testing results and that there was “no evidence that these Plaintiffs have been exposed to levels of mold that could cause injury.” But, by their own admission, they “fail[ed] to include the testing performed by [Wasatch’s] representative, [HEG], in [their] . . . initial response” and instead presented this evidence to the trial court for the first time in their motion for reconsideration. As we stated above, courts generally do not consider new facts and arguments presented in motions for reconsideration. *See Evans Withycombe*, 212 Ariz. 462, n.5, 133 P.3d 1168, 1173 n.5. Therefore, we do not consider the HEG report.

¶24 Nevertheless, Clair, the Granillos, Maynes, Ravancho, and the Sullivans argue that even without the HEG report there was “enough evidence . . . provided” in their oppositions to Wasatch’s motion for partial summary judgment “to show that there was substantial mold contamination in the apartments.” The Sullivans, the Granillos, and Maynes first argue that the trial court erred when it granted summary judgment against them because the “[a]djacent apartments[,] as well as many other apartments in the same building, showed visible mold and water damage.” But, as we stated above, to defeat a motion for summary judgment, the Sullivans, the Granillos, and Maynes were required to present some evidence that they were in fact exposed to injurious levels of toxic mold. *See Allen*, 102 F.3d at 199; *Grant*, 97 F. Supp. 2d at 989. It is not sufficient to imply that they were in the

general vicinity of some toxic mold. *See Claytor*, 662 A.2d at 1384 (“A mere showing that appellants worked at jobsites where appellees’ asbestos products were used at some point will not give rise to an inference, sufficient to defeat summary judgment, that appellants themselves may have been exposed to those products.”). Therefore, we do not find this argument convincing.

¶25 Clair, the Granillos, Maynes, Ravancho, and the Sullivans next argue that the trial court erred when it granted summary judgment against them because they presented enough evidence to survive summary judgment. They argue Dr. Goldstein’s suggestion that the mold in their respective apartments was the cause of their injuries, coupled with the contention that each had witnessed visible mold in their apartments, provided sufficient evidence to create a genuine issue of material fact regarding their exposure to toxic mold. But Dr. Goldstein is not competent to testify that there was, in fact, toxic mold in their apartments or that they were exposed to the toxins there at sufficient levels to cause their illnesses. And the only citations in the brief supporting Clair’s claim that there was visible mold in her apartment was presented to the trial court after the trial court had granted summary judgment.

¶26 Regarding the visible mold in the Granillos’, Maynes’s, and Ravancho’s apartments, they did present evidence to the trial court that they themselves either saw mold or smelled mold in their apartments. But, again, that evidence is insufficient to show that the mold was toxic or that there was enough of it to cause them injury. *See Allen*, 102 F.3d at 199; *Grant*, 97 F. Supp. 2d at 989. Therefore, the trial court correctly granted summary

judgment against Clair, the Granillos, Maynes, Ravancho, and the Sullivans because each failed to present evidence that he or she had been exposed to injurious levels of toxic mold in their apartments prior to the trial court’s grant of that motion.³

IV. Motion for Reconsideration

¶27 The dismissed plaintiffs argue that the trial court abused its discretion by “determining that [the] Harrington Court’s failure to rule on the motion for reconsideration constituted a *de facto* denial of the motion.” We review a trial court’s denial of a motion for reconsideration for an abuse of discretion. *McGovern*, 201 Ariz. 172, ¶ 6, 33 P.3d at 509.

¶28 After the dismissed plaintiffs filed their motion for reconsideration of Judge Harrington’s ruling granting summary judgment in favor of Wasatch, Judge Harrington recused himself and was replaced by Judge Davis. Judge Davis stated that by not ruling on the motion, Judge Harrington made a *de facto* denial of the motion for reconsideration. Judge Davis then addressed the substantive merits of the motion for reconsideration. He ruled that

³Ravancho minimally argues in a footnote that the trial court erred when it granted summary judgment against her because she lived in the same apartment as April and Makana Abad and “Jesleen Gonzales,” and the trial court did not grant summary judgment against them. We reject this argument however, because, as we stated above, it is not enough to show that the plaintiff was in the vicinity of toxic mold. *See Claytor v. Owens-Corning Fiberglas Corp.*, 662 A.2d 1374, 1384 (D.C. 1995). Rather, the plaintiff must show that he or she was in fact exposed to toxic mold at a level that can cause injury. *See Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1999); *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 968, 989 (D. Ariz. 2000). Ravancho failed to provide evidence supporting that contention.

after considering the merits of the motion to reconsider the court finds that plaintiff's counsel has failed to persuade the court that there have been substantial changes in essential issues or facts meriting reconsideration and reversal. The fact that all available information may not have been presented to Judge Harrington does not render his rulings granting summary judgment manifestly erroneous or unjust.

¶29 In their opening brief, the dismissed plaintiffs rely solely on the argument that the trial court erred when it found Judge Harrington's failure to rule on the motion for reconsideration constituted a de facto denial of it. The trial court addressed the merits of the motion for reconsideration and denied it on those grounds. Accordingly, even if Judge Davis erred in ruling that Judge Harrington's failure to rule was a de facto denial, any such error was harmless. Therefore, we need not address their argument that the trial court abused its discretion when it determined Judge Harrington's "failure to rule on the motion for reconsideration constituted a *de facto* denial of the motion."

¶30 In their reply brief, the dismissed plaintiffs cursorily argue that "[t]he Davis Court also clearly erred when it refused to grant reconsideration on the grounds that no new issues of fact or circumstances had come to light between the granting of the motion [for] summary judgment and the motion for reconsideration." But "an issue raised for the first time in appellant's reply brief comes too late." *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992). And, even if we were able to consider this contention, it does not "contain . . . the reasons [supporting the argument], with citations to the authorities, . . . and parts of the record relied on." Ariz. R. Civ. App. P. 13(a)(6). Therefore, we do not consider this argument.

The Hansen Appeal

¶31 Plaintiffs argue that the trial court erred when it granted summary judgment in the Hansens' favor. On October 26, 2005, the Hansens filed a motion for summary judgment regarding their personal liability, arguing there was an insufficient factual and legal basis to hold them personally liable.

¶32 On November 15, 2005, plaintiffs filed a response and controverting statement of facts. Attached to their statement of facts were the deposition transcripts of various witnesses, Wasatch's mission statement, and nine unmarked photocopied photographs. The Hansens filed their reply and a motion to strike plaintiffs' statement of controverting facts. The Hansens argued that plaintiffs relied on

testimony obtained prior to the Hansens being named as Defendants or served with process in this case; . . . testimony [that was] inadmissible hearsay; . . . testimony [that was] misstated and/or outright misrepresented by [plaintiffs] in their zeal to stick something, anything, to the Hansens personally; and/or . . . testimony [that was] irrelevant to [plaintiffs'] punitive damages claim against the Hansens individually.

¶33 The trial court held two hearings on the motion for summary judgment and motion to strike. On March 28, 2006, the trial court heard argument on the Hansens' motion for summary judgment and motion to strike. The court held another hearing on April 6 where it addressed the Hansens' objections to plaintiffs' statement of facts and the motion for summary judgment. On April 10, the trial court granted the Hansens' motion for summary judgment.

¶34 On April 24, 2006, the trial court granted the Hansens’ motion to strike the controverting statement of facts, finding it was “based upon depositions taken prior to the time [the Hansens] were parties [and] . . . contained so many miscitations, errors and false statements that [it was] unworthy of examination by the court.” The trial court then affirmed the summary judgment, finding:

What remains of plaintiffs’ controverting statement of facts is insufficient to withstand summary judgment. The best that can be said is that it raises some speculation that there is some doubt or a scintilla of admissible evidence, or that some disputed fact in plaintiffs’ controverting statement might grow into a genuine issue of fact during plaintiffs’ case-in-chief. Summary judgment cannot be avoided on this basis. The record demonstrates there is no genuine issue of fact regarding the personal liability of [the Hansens].

The trial court entered a signed final judgment in favor of the Hansens on May 5, 2006, from which plaintiffs now appeal.

¶35 To survive a motion for summary judgment, the nonmoving party “must set forth specific facts showing that there is a genuine issue for trial,” and those facts must be “admissible in evidence.” Ariz. R. Civ. P. 56(e), 16 A.R.S., Pt. 2. “We will affirm if the trial court’s ruling is correct on any ground and if the facts produced in support of [the plaintiff’s] claims ‘have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced.’” *MacLean v. State*, 195 Ariz. 235, ¶ 18, 986 P.2d 903, 908 (App. 1999), quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); see also *Mohave Elec. Coop., Inc. v. Byers*,

189 Ariz. 292, 303, 942 P.2d 451, 462 (App. 1997) (“A defendant can obtain summary judgment when the plaintiff is unprepared to establish a *prima facie* case.”).

¶36 Appellants first argue that “[t]he trial court erred in striking [their] Statement of Facts.” “We review the trial court’s evidentiary rulings for a clear abuse of discretion.” *Larsen v. Decker*, 196 Ariz. 239, ¶ 6, 995 P.2d 281, 283 (App. 2000). “Th[is] principle[] appl[ies] to questions of the admissibility of evidence in summary judgment proceedings.” *Mohave Elec. Coop.*, 189 Ariz. at 301, 942 P.2d at 460. If inadmissible or otherwise deficient materials are submitted in opposition to a motion for summary judgment, those materials are subject to a motion to strike. *See Johnson v. Svidergol*, 157 Ariz. 333, 335, 757 P.2d 609, 611 (App. 1988) (“When insufficient supporting documents are submitted, a motion to strike is appropriate.”); *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001) (failure to file motion to strike waives objection to “any deficiencies in the documents . . . attached to . . . motion for summary judgment”).

¶37 The trial court found that even if the statement of facts was not based on inadmissible deposition testimony, it

contain[ed] so many miscitations, errors and false statements that they are unworthy of examination by the court and should be stricken on that basis alone. Plaintiffs point out earlier rulings by the trial court [that] prevented plaintiffs from obtaining affidavits from defendants’ employees. However, the court agrees with defendants’ position that plaintiffs were not without the ability to cure this problem, but plaintiffs chose not to seek relief with Rule 56(f)[,] Ariz. R. Civ. P. The court also finds the Defendants’ objections based upon hearsay and lack of foundation should be sustained. Inadmissible or otherwise deficient materials submitted in opposition to a motion for summary judgment should be challenged through a motion to

strike. . . . The plaintiffs[] supplemented their controverting statement of fact[s] after oral argument to correct the numerous errors, miscitations and false statements exposed at oral argument. It will not be considered by the court. The defendant[s'] objection to the supplemental controverting statement of facts was sustained in the court's minute entry of April 04, 2006.

¶38 Plaintiffs argue the trial court incorrectly found their statement of facts contained “miscitations, errors, and false statements” but did not explain why in the opening brief. In addition, plaintiffs did not attempt to factually support their stricken statement of facts in their opening brief and instead do so for the first time in their reply brief. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992) (“[A]n issue raised for the first time in appellant’s reply brief comes too late.”). Furthermore, the Hansens detailed their position concerning each of the inaccuracies and inadequacies of plaintiffs’ statement of facts in their answering brief. Even if we were to consider the arguments in plaintiffs’ reply brief, the Hansens provide more than sufficient support for the trial court’s decision to prevent us from finding that it abused its discretion.⁴

⁴Plaintiffs also argue in their reply brief that the “facts incorporated [in their] motion for punitive damages provided further questions of material fact that precluded summary judgment”; “pursuant to [Rule] 32(A), [Ariz. R. Civ. P., 16 A.R.S., Pt. 1], additional testimonial facts and inferences that were erroneously precluded would have provided additional questions of material fact that should have prevented summary judgment”; “additional facts and inferences contained in [plaintiffs’] motion for reconsideration provided further questions of material fact, which precluded summary judgment”; the “trial court should have taken notice of the whole record”; and, “by operation of law, actual notice by direct and circumstantial evidence, including knowledge, creation, participation and acquiescence [in] unreasonably dangerous mold condition[s], are attributed to both Hansens.” But “an issue raised for the first time in appellant’s reply brief comes too late.” *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992). Moreover, even if the arguments were not waived, we note the Hansens’ objections that

¶39 Plaintiffs argue that the trial court erred because they were not afforded the opportunity to cure the alleged defects in their statement of facts. Although we agree with plaintiffs that “[o]bjection to insufficient documentation is required so that the offering party may have an opportunity to cure the alleged defects,” *Johnson*, 157 Ariz. at 335, 757 P.2d at 611, we disagree with their contention that they were not afforded such an opportunity.

¶40 Under Rule 7.1(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, after a motion has been filed in the court, “[e]ach opposing party shall within ten days thereafter serve and file any answering memorandum.” The Hansens filed their motion to strike on December 5, 2005. The trial court held oral argument on the motion for summary judgment and motion to strike on March 28, 2006, and again on April 6, 2006. Plaintiffs did not file any response to the Hansens’ motion to strike until April 6, four months after the motion was filed and after a hearing had already been held on the issue. Thus, it appears from the record that plaintiffs had ample time to file a response to the motion and that the trial court did not abuse its discretion when it refused to consider their response filed the same day as the second hearing on the issue, four months after the motion had been filed.

¶41 Plaintiffs additionally argue that “the trial court erred in precluding the use of certain depositions as evidence against Appellees Hansen [and] such error was prejudicial to [them].” In its first minute entry granting the Hansens’ motion for summary judgment,

plaintiffs’ reply does not comply with the Rules of Civil Appellate Procedure because it does not sufficiently cite the record, mischaracterizes and misrepresents the evidence in the record, and should be stricken would preclude us from addressing those arguments in any event.

the court also granted the Hansens' motion to preclude or limit the use of deposition testimony at trial. But, in its second minute entry granting summary judgment, the trial court granted the Hansens' motion to strike because plaintiffs' statement of facts contained "so many miscitations, errors and false statements that they are unworthy of examination." As we stated above, the trial court did not err when it refused to consider the statement of facts on that basis. Therefore, we need not address the argument that the trial court erred in precluding the deposition testimony contained in the statement of facts, which it properly struck.

¶42 Plaintiffs next argue that the trial court erred when it found there was no genuine issue of fact regarding the personal liability of the Hansens. A corporation is generally treated as a separate entity from its shareholders and officers, and they are not personally liable for the wrongs of the corporation. *See Standage v. Standage*, 147 Ariz. 473, 475-76, 711 P.2d 612, 614-15 (App. 1985). But officers are personally liable for their own tortious conduct committed while operating the corporation. *See Jabczenski v. S. Pac. Mem'l Hosp.*, 119 Ariz. 15, 20, 579 P.2d 53, 58 (App. 1978). Consequently, to defeat summary judgment, a plaintiff must present facts showing "the . . . officers . . . participate[d] or ha[d] knowledge amounting to acquiescence or [were] guilty of negligence in the management or supervision of the corporate affairs causing or contributing to the injury." *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 145 Ariz. 204, 210-11, 700 P.2d 902, 908-09 (App. 1985); *see also* Ariz. R. Civ. P. 56(e).

¶43 Plaintiffs argue that the Hansens can be held personally liable because “many direct facts and inferences indicate that the Hansens knew of the unreasonably dangerous conditions at Eastside Place and took no precautionary action.” Plaintiffs argue that the Hansens “were intimately involved with the operations at Eastside Place” and threatened to, and did, fire workers that complained about the mold problems. They also argue that the Hansens knew about the siding problems, but did nothing to remedy them; that they knew of the mold infestations, but blamed the tenants for the problem; that they actively covered up the mold’s existence; and that they failed to adequately address the problem; instead, they actively engaged in concealing the problem by painting over and re-siding areas with visible mold.

¶44 But our review is limited to those facts that were presented to the trial court in support or opposition of the motion for summary judgment. *See Mohave Elec. Coop.*, 189 Ariz. at 302, 942 P.2d at 461 (“All evidence and the record presented *at the time of the order* must be viewed in the light most favorable to the nonmovant.”) (emphasis added). And, as we stated above, the trial court did not abuse its discretion when it struck plaintiffs’ statement of facts. Therefore, we will not consider these facts. Moreover, none of the statements asserting facts supporting the existence of a genuine issue of material fact cite the record. *See Ariz. R. Civ. App. P. 13(a)(6)* (argument must be supported by “parts of the record relied on”). And we will not assume they can be properly considered here.

¶45 Plaintiffs also argue that “[t]he trial court abused its discretion by precluding Steven Collins as an expert witness.” Plaintiffs asserted Collins would testify on mold

remediation methods and standards, but at his deposition, plaintiffs' counsel would not allow Collins to answer the Hansens' questions on those issues. The motion for summary judgment was based on the Hansens' contention that they could not be held personally liable for the actions of Wasatch, and the trial court granted the motion on that basis. Therefore, whether the trial court correctly precluded Collins as an expert witness is irrelevant to the issues on appeal.

¶46 Finally, plaintiffs argue that the trial court erred when it dismissed the claims of all the adult plaintiffs on the ground they were barred by the statute of limitations and when it granted summary judgment in favor of the Hansens on the issue of punitive damages. But we have already concluded that the trial court correctly granted summary judgment on the issue of the Hansens' personal liability and their dismissal from the lawsuit was appropriate; therefore, we need not address these arguments.

Conclusion

¶47 For the foregoing reasons, we affirm the trial court's grant of partial summary judgment in favor of Wasatch and its grant of summary judgment in favor of the Hansens.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge